



Legislative
Research
Council

MINUTES

Department of Game, Fish and Parks
Agency Review Committee

Second Meeting
2008 Interim
Monday & Tuesday, August 11 & 12, 2008

LCR 1 & 2
State Capitol Building
Pierre, South Dakota

The second meeting of the interim Department of Game, Fish and Parks Agency Review Committee was called to order by Senator Tom Hansen, Chair, at 9:05 a.m. (CT), on Monday, August 11, 2008, in Legislative Conference Rooms 1 and 2 of the State Capitol, in Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Senators Tom Hansen (Chair), Ed Olson, and Nancy Turbak Berry; and Representatives Dale Hargens, Gordon Howie, Kent Juhnke, Betty Olson, David Sigdestad and Kim Vanneman. Representatives Thomas Brunner (Vice Chair), Mark DeVries and Eldon Nygaard were present following the roll call. Senator Ryan Maher was excused.

Staff members present included Reuben Bezpaletz, Chief Analyst for Research and Legal Services; Doug Decker, Code Counsel; Tom Magedanz, Principal Research Analyst; Aaron Olson, Senior Fiscal Analyst; David Ortbahn, Principal Research Analyst; and Kris Schneider, Senior Legislative Secretary.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For the purpose of continuity, these minutes are not necessarily in chronological order. This meeting was web cast live. The archived web cast is available at the LRC web site at <http://legis.state.sd.us> under "Interim Information – Minutes and Agendas."

Department Introductions

Mr. Jeff Vonk, Secretary of the Department of Game, Fish and Parks (GFP), introduced Game, Fish and Parks Commissioners **Mr. Spencer Hawley**, Brookings, Chair, and **Mr. Mert Clarkson**, Ludlow. Staff members introduced were **Mr. Doug Hofer**, Director, Division of Parks and Recreation; **Mr. Tony Leif**, Director, Division of Wildlife; **Mr. Chris Petersen**, Director, Division of Administration; **Mr. Richard Neill**, Staff Counsel; **Mr. Emmett Keyser**, Assistant Director of Field Operations, Division of Wildlife; and **Mr. George Vandel**, Assistant Director of Technical Services, Division of Wildlife.

Approval of Minutes

Representative Sigdestad moved, seconded by **Representative Juhnke**, that the **June 11, 2008**, minutes be approved. Motion prevailed on a voice vote.

Land Acquisitions and Land Acquisition Policy

Secretary Vonk stated that the department was given the authority to make land acquisitions in SDCL 41-2-19. The majority of the land acquired by the department is used by the Division of Wildlife. **Mr. Tony Leif** and **Mr. George Vandel** gave an overview of the land acquisition guidelines and the process that is followed. There must be a willing seller, state law must be followed; can not pay more than fair market value (a State Certified Appraiser is used); economic impact is reviewed; if land no longer meets the needs of the department, it is sold or exchanged; accept land donations if certain requirements are met; and use geographic information systems to keep close track of habitat on the property. A summary of the past two years of land acquisitions by the Division of Wildlife was distributed (**Document 1**). Approximately 3,000 acres was purchased at a cost of approximately \$2 million. Most of the land purchased was adjacent to property that is already owned by the department. It was noted that when federal money is used, the purchase is also reviewed at the federal level. The department pays annual property tax on the land. The fee title transfer of land along the Missouri River in 2006-2007 added approximately 30,000 acres to the Game Production Areas (GPA).

Public Testimony

Mr. Ron Pesek, Yankton, representing Pheasants Forever, spoke about the need for additional GPA in the Yankton area.

Mr. Joe Logue, Oelrichs, Fall River County, spoke about the need to develop a gray wolf plan for the state. He would like to see legislation passed that would require that the gray wolf be treated the same as a coyote. He believes that the open fields doctrine is misused by the GFP personnel. He believes that the department does not need to purchase land; however, if they do, it should require legislative approval. He does not believe in section line hunting. He also testified that hunters should not be allowed to shoot over a section line onto private land.

Ms. Susan Clarkson, Ludlow, Harding County, spoke in opposition to the open fields doctrine. She believes that GFP personnel should have to ask permission before entering land unless there is probable cause.

Mr. Craig Shaver, Sturgis, Meade County, spoke in favor of Mr. Logue's comments regarding a gray wolf plan. He asked the department to consider allowing "group hunting" in big game because so many deer tags go unfilled. Mr. Shaver also stated he would like to see legislation that would require any purchase of land be an exchange. He does not want to see the diminishment of private property in the state.

Mr. Chris Hesla, Pierre, Executive Director for the South Dakota Wildlife Federation, commended Secretary Vonk and staff for the very good job they are doing. He spoke in support of the open fields doctrine and for the land purchases made by the department. Mr. Hesla stated the Division of Wildlife's budget should remain as is, not part of the General Fund.

Mr. Bill Kluck, Mud Butte, stated that the department needs to continue working on landowner relations.

Mr. Richard Meyer, Sturgis, spoke in opposition to the open fields doctrine. He suggested using game checks instead. He feels the open fields doctrine is bad for the department's public relations. He also stated that the hiring of the Secretary for the department should be by the GFP Commission.

Mr. Clark Blake, Belle Fourche, Harding County, spoke regarding aerial hunting and the stringent rules that make it hard for ranchers to protect livestock from predators. He would like to see the rules relaxed.

Ms. Jan Nicolay, Chester, stated that she has not always agreed with the GFP over the years; however, she noted that they do a good job balancing recreational, environmental, and educational uses and economic development and tourism along with landowners and sportsman issues, and working with the federal government. She supports the open fields doctrine. She asked the committee not to lose the big picture of the good use of the sportsman's dollar.

Mr. Todd Mortenson, Hayes, stated that he is not in favor of the department acquiring more land West River as it is taking people out of the community. Representing the South Dakota Cattlemen's Association, Mr. Mortenson stated that the members have a positive relationship with GFP. They are concerned with land acquisitions and would like the GFP Commission to hold the public hearings in the county where the land is being purchased. The Association would like the department to have to sell an acre for every acre purchased.

The committee recessed for lunch at 11:56 a.m. and reconvened at 1:19 p.m.

Ms. Angela Ehlers, Presho, representing the South Dakota Conservation Districts, stated that the GFP works very well as partners with the conservation districts and federal agencies.

Mr. Brian Dail, Rapid City, past president of the Rocky Mountain Elk Foundation, stated that overall the department does a very good job. He may not always agree with the department; however, has always had access to department personnel. He stated that it was important that they remain independent in their existence.

Mr. Brad Reis, Hamill, Tripp County, representing both himself and the South Dakota Farmers Union, questioned why nonresident fees are higher, especially on federal lands, when the department's policy statement states they manage wildlife for the state of South Dakota and its visitors. He does not like the idea that if he has to agree to public access if he wants GFP to manage the wildlife on his property. Mr. Reis does not believe he should have to pay the \$5 surcharge when he only hunts on his property. He also questioned the fees for the special buck license. He would also like to see a requirement added that prior to buying an option on a parcel of land, there be a public hearing held. He does not support the open fields doctrine. Mr. Reis also stated that since the GFP has taken over the Army Corps of Engineers campgrounds, everything has a fee now.

Mr. Paul Lepisto, Pierre, Regional Conservation Coordinator for the Izaak Walton League, stated that GFP does a tremendous job. They work with the department on various land and wetland protection projects, endangered species, invasive species, and Missouri River flow management issues. He stated that the budget process for the department should be left as it is currently so the biologists can continue to manage the natural resources. The League is in favor of increasing public access and supports the North American Model of Wildlife Management.

Copies of the following written testimony were distributed to the committee:

1. Mr. Dan Schueler, President of the South Dakota Chapter National Wild Turkey Federation, letter dated August 4, 2008.
2. Mr. Arnie Goldad, President of the The Sportsman's Club of Brown County, Inc., letter dated August 7, 2008.
3. Mr. John Simpson, letter dated August 7, 2008.
4. Mr. Bob Roe, e-mail dated July 29, 2008.
5. Mr. Charles Rokusek, letter dated August 8, 2008.
6. Mr. Scott VanderWal, South Dakota Farm Bureau, e-mail dated August 8, 2008.
7. Mr. William E. Clayton, letter dated August 8, 2008.
8. Mr. Charles Rokusek, Secretary-Treasurer of the 29-90 Sportsman's Club, letter dated August 8, 2008.
9. Information provided to Representative Gordon Howie: listing of Black Hills Regional Multiple Use Coalition (BHRMUC) Directors, Resolution on Gray Wolf Policy; Resolution adopted by the Fall River County Commission; Resolution adopted by the Custer County Commission; letter dated June 22, 2008, from Mr. Joe Logue; letter dated July 13, 2008, from Mr. Ken Couch; pictures of Custer State Park on July 6, 2008; May/June 2008 article entitled "Governor Declares May 2008 as Noxious Weed Awareness Month" from the South Dakota Cattleman; e-mail from Mr. Rich Sundberg dated August 1, 2008.
10. Mr. Chuck Berdan, letter dated August 7, 2008.
11. Mr. Llewellyn Englehart, letter dated August 9, 2008.
12. Ms. Karen Englehart, letter dated August 10, 2008.
13. Mr. William J. Johnson, e-mail dated August 9, 2008, and note (not dated).
14. Mr. Tom Yseth, e-mail dated August 10, 2008.
15. Mr. David Niemi, note (not dated). (**Documents 2 -16**)

Representative Betty Olson stated that a copy of the transcript of the U.S. vs. Jerry M. Janvrin case was available for anyone who wanted to see it.

Department Response to Public Testimony and Committee Questions

Secretary Vonk responded to the concerns raised about the gray wolf. He stated that the U.S. Fish & Wildlife Service has delisted the gray wolf in eastern South Dakota and in the Rocky Mountain area; western South Dakota was not included. The department has gone on record asking for delisting in western South Dakota. LRC staff distributed a copy of HCR 1006 from the 2008 Legislative Session regarding the delisting of gray wolves (**Document 17**).

In response to written testimony regarding the prairie dog infestation in Custer State Park from Wind Cave National Park, Secretary Vonk stated that there is a commitment from both parties to work together on the issue; however, no meeting has been held to date.

In response to a question from Mr. Couch on the accounting of depredation expenditures, Secretary Vonk stated the department would provide that information to the committee.

In response to comments made regarding an issue of a trapper in Harding County, Secretary Vonk stated that the department has also had comments from supporters.

With regard to fees to run animal damage control, GFP would work with any county commission to enter into a memorandum of agreement. At the present time, GFP has not been contacted by any local agency.

With regard to the aerial hunting issues, Mr. Keyser stated that GFP operates under the guidance of the federal government (i.e., U.S. Fish and Wildlife, Federal Aviation Administration, and the Federal Airborne Hunting Act) and must comply with their regulations.

With regard to noxious weeds, Secretary Vonk stated that by statute the department is required to control noxious weeds. In 2007, the Division of Wildlife spent \$900,000 on chemicals over 15,000 acres. They use private applicators and pest control boards. The conservation officers, land management staff, and the public all watch for the weeds.

In response to a suggestion that additional antlerless deer tags be made available to decrease the deer population, Mr. Leif stated that is currently being done with the some seasons. He stated there are always leftover antlerless tags.

In response to a question regarding the relationship between the GFP Foundation and the department and how much property the foundation currently owns, Mr. Leif stated the relationship is very limited. The GFP Foundation is a mechanism that people may use to make a donation to the State. Secretary Vonk stated that he would provide background information about the foundation and the land the GFP Foundation currently owns.

In response to a question about the goose depredation and the limitations on hunting seasons, Mr. Leif stated that the department will make adjustments for hunters if they can not hunt in the ten days designated. He noted that many of the licenses are not sold.

In response to a question if the county and townships receive any monies for road maintenance, Mr. Leif stated that it is required by statute that the licensee fees may only be used for the management of hunting and fishing. If the money was used for road maintenance, it would put federal funds in jeopardy. He noted that in the past, the counties did receive money when the county treasurer was handling license sales.

In response to a question if the \$2 surcharge on licensees could be diverted to the counties for road maintenance, Mr. Leif stated the surcharge is to cover administrative expenses for those selling the licenses. The department would have to ask a federal auditor for their interpretation.

Trespass Law

Mr. Reuben Bezpaletz presented the evolution of trespass law and how over the course of time and in the Legislature people have struggled to adapt common law and hunting access in the United States.

The original common law trespass law protected landowners. Over the years the Roman system (criminal law) and Germanic system (civil law) became mixed in England. He explained that common law revolved around trespass and poaching. In later years, a concern about protection of real property rights evolved. Today trespass can be viewed as a criminal violation, a GFP violation, or a personal injury. A landowner must post their land in order for trespass to be enforced. Road hunting and unarmed retrieval is a technical trespass that the Legislature has authorized. It is hard for a State's Attorney to prosecute criminal trespass. It is also hard to show a civil injury as you have to prove real damages. Landowners still believe in common law and have an anti-government stance and some do not accept the common ownership of wildlife.

Open Fields Doctrine

Mr. Emmett Keyser presented background on the Open Fields Doctrine issues. In the late 1800's the wildlife populations were vanishing so citizens asked for protection and conservation efforts. All states hired game wardens (conservation officers) to provide for the enforcement of fish and wildlife laws and regulations. Because wildlife is a public trust resource and belongs to all citizens in the State, the Legislature enacted laws to provide for such protection and management. This statutory authority is provided for in SDCL 41-15-10 and 41-15-10.1. Mr. Keyser explained that the basis for the controversy involving the open fields doctrine is because compliance checks can occur on private lands. Conflicts arise over private property rights versus protection and management of publicly owned wildlife. Compliance checks are necessary to determine if a person is properly licensed, is adhering to bag limits and other laws and regulations designed to protect public wildlife and ensure fairness and equity. The legal authority for the open fields doctrine is based upon U.S. Supreme Court decisions which support the ability of law enforcement officers to make contacts and conduct searches in "open fields" on private lands. In 2004, the Attorney General issued an opinion (04-01) which supports the ability of law enforcement officers to make contacts and conduct searches in open fields on private land.

In response to a committee question whether trespass would be civil or criminal, Senator Turbak Berry stated the criminal trespass would require intent and most important procedurally it has to proceed in the name of the public. A civil action is brought by anyone who is an aggrieved party.

The committee recessed at 5:00 p.m.

Tuesday, August 12, 2008

The committee reconvened at 8:32 a.m. with Chair Senator Tom Hansen presiding.

A quorum was determined with the same members present.

Open Fields Doctrine (continued)

Mr. Keyser continued the presentation on open fields doctrine by reading a portion of the Attorney General's opinion to the committee. He also reviewed the department's policy on when GFP employees may enter private land. A copy of a memo dated August 11, 2008, was distributed to the committee with the following documents attached:

1. GFP Information – "Compliance Checks Critical to Wildlife Conservation";
2. GFP Information – "Background Information and Legal Issues Pertaining to the Open Fields Doctrine and Conservation Officers Conducting Compliance Checks on Private Lands";
3. GFP Policy – "Requirements for Agency Employees Entry Onto Private Lands"; and
4. SD Attorney General's Official Opinion No. 04-01 "Conservation Officer's Entry Upon Private Land". (**Documents 18 – 22**)

Mr. Keyser reviewed "The 8-Point Conservation Officer Communications Enhancement Plan" that was developed to improve communications with the citizens of South Dakota. Other items that the department has done or will be doing to improve communications include the "Landowners Matter" publication, legislative outreach efforts conducted by regional wildlife staff; the Wildlife Issues panel has been reconfigured into regional advisory panels, the GFP webpage will be getting a facelift to become more user friendly, and additional outreach and information hearing mechanisms via e-mail will be used.

Committee Discussion

Following discussions throughout the committee meeting about various incidents that have resulted in loss of hunting privileges and/or fines, Senator Turbak Berry reminded the committee that they, as the Legislature, have imposed the mandatory sentences and that perhaps they should look at "lightening up" on some of the mandates.

Rules Promulgation

Mr. Doug Decker reviewed the rules promulgation process that is provided for in SDCL 1-26. He explained the process includes review for statutory authority and style and form, public notice, public hearings, and filing with the Secretary of State. He noted that it is a statutory requirement that the rules must be filed with the Secretary of State within 75 days of the public hearing. The LRC website and the *SD Register* are two publications that may be used to stay abreast of the rule promulgation process.

Mr. David Ortbahn, who reviews the GFP rules, explained the past history and change made in 1984 that moved the fee setting authority from the Legislature to the GFP Commission.

Mr. Decker noted that when an agency proposes a fee increase, the Interim Rules Review Committee is provided a Small Business Impact Statement, a fiscal note, and a Fund Balance Condition Statement.

Mr. Leif explained the process that the GFP uses in promulgating rules. He distributed a handout entitled "2008 Schedule for Setting Seasons/Regulations" that the Division of Wildlife uses (**Document 23**).

Commissioner Spencer Hawley commented that the open hearing before the commission is an important part of the rules promulgation process. He noted that the department provides the commission with the biological side.

In response to a question why Purple Heart recipients are not exempted from park entrance licenses, **Mr. Doug Hofer** stated that statute does provide for a discount for certain veterans. The exceptions are set forth in law and any changes must be done by the Legislature as the GFP Commission does not have the authority to do so.

In response to a question about the possibility of park fees and license fees being increased, Commissioner Hawley stated that the last fees were adjusted five years ago. The commission may need to make some adjustments on the parks side for roads and there may be some small changes on the wildlife side.

Public Access Programs

Walk-In Area Program

Mr. George Vandel reviewed the Walk-In Area program. He explained that 50% of the funding for this program is from the access portion of the \$5 surcharge, 40% is from the PR Wildlife Restoration funds, and 10% is from hunting/fishing license fees. There are 1.18 million acres enrolled in 2008 and 1,138 cooperators. Mr. Vandel noted that the West River walk-in areas are used for big game hunting and the East River walk-in areas are primarily small game hunting. Approximately 90% of the permanent undisturbed habitat is CRP land. The walk-in area program is evaluated annually.

Control Hunting Access (CHAP) Program

Mr. Vandel reviewed the Control Hunting Access (CHAP) program. The goal for the program is to achieve big game (including turkey) hunter access to and recreational use of specific private lands for hunting by controlling the amount of hunter use at a given time. It also allows for special provisions for uses unique to the CHAP tract.

Landowners with 1,000 or more acres receive an enrollment payment of \$250 flat base payment plus \$6/hunter-day for each hunter day of use. In addition, landowners are eligible for

bonus payments per hunter day. Landowners with less than 1,000 acres receive \$6/hunter-day of use and are also eligible for bonus payment per hunter day. The bonuses include: \$2/hunter-day if there is no big game species restriction, and/or \$2/hunter-day if the enrolled acreage is open for hunting for the entire season for all species allowed to be hunted. In 2008 there were six East River properties enrolled with 1,616 acres and six West River properties enrolled with 19,980 acres. The minimum payment will be \$250 and the maximum payment will be \$12,000.

Lower Oahe Waterfowl Access

Mr. Vandel reviewed the Lower Oahe Waterfowl Access Program that began in 1998 with 11,332 acres. This past year the annual cost for the leases was about \$190,010 for 33,819 acres.

Landowner Preference Programs

Mr. Vandel reviewed the history of the West River deer license allocations. He stated that the dilemma for commercial deer hunting is obtaining nonresident permits. He stated that there is a higher demand for buck licenses; however, there are limited numbers for both residents and nonresidents. Resident non landowners probably draw an "any" buck tag once every two or three years. Resident landowners get a tag every year via the 50% landowner preference or landowner on own land tag. He noted that this was specific to West River. There is a higher demand for "any" deer tags East River. Nonresidents can only obtain leftover "doe" tags and/or archery deer licenses. Many of the East River units require residents to have several years' preference to obtain a tag; a few require six or more years.

Over the years GFP has tried to resolve the issue through legislation, through the West River Deer Citizen Task Force, the West River Deer Roundtable, and the West River Deer Issues Work Group. Some of the results of the various group efforts included legislation in 1998 that created a \$5 surcharge to be used 50% for access and 50% for depredation assistance; increased fees for bucks and reduced fees for does, and allow landowner-on-own land to select a single "any buck" tag or choose a tag from any license types available in their unit. Many of the recommendations did not receive public or legislative support. Mr. Vandel explained the Special Buck Season that was created in 1988 by the GFP Commission and the changes that have occurred in 1989, 1996, 1998, and 2005.

Topics for Next Meeting

Mr. Bezpaletz stated that staff and the department are reviewing the department's statutes for style and form and will have draft legislation at the next meeting.

Representative DeVries moved, seconded by Representative Hargens, to have a short presentation on "South Dakota's Comprehensive Wildlife Conservation Plan" which deals with non game species and the impact on land use in both urban and non urban areas. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting

Aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Howie moved, seconded by Representative Juhnke, to have a discussion on the allocation of big game tags and related subjects. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting Aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Betty Olson moved, seconded by Representative Howie, that the committee consider Bill Draft 574P0586 entitled "An Act To Clarify The Application Of Common Law Trespass And To Provide For The Recovery Of Damages Against Trespassers" (Document 24) at the next meeting. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting Aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Betty Olson moved, seconded by Representative DeVries, that HB 1103 from the 2005 Legislative Session entitled "An Act To Restrict The Entry Of Conservation Officers Onto Certain Private Land Without Permission" (Document 25) be considered at the next meeting. Motion failed on a roll call vote with 5 Ayes, 7 Nays, 1 Excused. Members voting aye: Brunner, DeVries, Howie, Nygaard, Betty Olson. Members voting Nay: Tom Hansen, Hargens, Juhnke, Ed Olson, Sigdestad, Turbak Berry, And Vanneman. Member excused: Maher.

Representative Nygaard moved, seconded by Ed Olson, that the issue of allowing a Purple Heart Pass, similar to the Golden Pass issued by the National Parks Service, be considered at the next meeting. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Brunner moved, seconded by Ed Olson, to discuss possible legislation or restrictions to otherwise guide the department in acquiring land around Bear Butte State Park. Motion prevailed on a roll call vote with 12 Ayes, 1 excused. Members voting aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Betty Olson moved, seconded by Representative DeVries, to discuss the possibility of moving the Animal Damage Control Program from the Department Of Game, Fish and Parks to the Department of Agriculture. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Representative Juhnke Moved, Seconded By Representative Brunner, that legislation be drafted to change the \$5 surcharge monies allocated to depredation to the counties for road maintenance. Motion prevailed on a roll call vote with 12 Ayes, 1 Excused. Members voting aye: Brunner, DeVries, Tom Hansen, Hargens, Howie, Juhnke, Nygaard, Betty Olson, Ed Olson, Sigdestad, Turbak Berry, Vanneman. Member excused: Maher.

Next Meeting Date

Chair Hansen set the third and final meeting for Tuesday, September 23, 2008, in Pierre.

Adjournment

Senator Ed Olson moved, seconded by Representative Hargens, that the meeting be adjourned. Motion prevailed on a voice vote.

The chair adjourned the meeting at 12:35 p.m.

